Supreme Court, U.S.
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Docket No. _____

**In The**

**Supreme Court of the United States of America**

**October Term, 2001**

**IN THE MATTER OF**
**Marcus Jones**
*Petitioner,*
v.
**United States of America,**
*Respondent.*

**On Petition For a Writ of Certiorari**
**To the United States Court of Appeals**
**For the Fifth Circuit**

# PETITION FOR WRIT OF CERTIORARI

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37pp

## QUESTION PRESENTED

1. Whether the failure of the government to schedule crack cocaine, (Petitioner uses the term "crack cocaine" for whatever is crack cocaine or cocaine free base rather than repeat both terms throughout the discussion) pursuant to the Controlled Substances Act (C.S.A.) of 1970 makes the indictment a legal nullity. Whether "Legally New" drugs must be scheduled pursuant to the Controlled Substance Act (C.S.A. 1970) before offenses involving them can be prosecuted by the law.

2. Whether the failure of the Government to schedule crack cocaine pursuant to the controlled substances act (C.S.A.) of 1970 deprives the Court of subject matter jurisdiction.

3. Whether failure of the Government to schedule crack cocaine violates the Accardi Doctrine.

4. Whether the petitioner raised a Constitutional Issue in his 2255 that shows jurist of reason would find it debatable whether the 2255 states a valid claim of the denial of a Constitutional Right, and that jurists of reason would find it debatable whether the District Court was correct it its ruling.

5. Whether a federal prisoner who demonstrates that he is incarcerated for conduct that does not constitute a Federal Crime has made a substantial showing of the denial of a Constitutional right warranting issuance of a Certificate of Appealability under 28 U.S.C. 2255.

## PARTIES

| | |
|---|---|
| Petitioner | Marcus Jones |
| Respondent | United States of America |

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# PETITION FOR A WRIT OF CERTIORARI

Marcus Jones, respectfully Petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case

## OPINIONS BELOW

The order of the Fifth Circuit (APPX.1) is unreported.
The opinion of the District Court (APPX.2 and 3) is unreported.

## JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit was issued December 21,2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1) and pursuant to *Hohn v. United States* 524 US 236 (1998).

## CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in pertinent part: no person shall be *** deprived of *** liberty *** without due process of law;

Amendment V of the United States Constitution provides in pertinent part: *** guarantees that the accused has been indicted by a grand jury which is the basis for jurisdiction.

## SUBJECT MATTER JURISDICTION

Crack cocaine has not been established by
Congress, or the Government.
Controlled Substance Act (C.S.A. of 1970)
21 U.S.C. 801
21 U.S.C. 802
21 U.S.C. 811
21 U.S.C. 812
Administrating Procedure Act (A.P.A.)
5 U.S.C. 551-559

Food, Drug and Cosmetic Act 21 U.S.C. 301 et seq.
Accardi Doctrine pursuant
*Accardi V. Shaughnessy* 371 U.S. 260 (1954)

## STATEMENT OF THE CASE

Petitioner was indicted on April 22, 1988 in a five (5) count indictment. Count one charging Petitioner with knowingly and intentionally conspiring to distribute and posses fifty (50) grams or more of a mixture or substance containing cocaine base, also known as crack cocaine, and 5 Kilograms or more of a mixture or substance containing crack cocaine, also known as powder cocaine in violation of Title 21, United States Code, Section 841 (a) (1).

Count three charged the Petitioner with knowingly and intentionally attempting to posses with intent to distribute fifty (50) grams or more of a mixture or substance containing cocaine base, also known as crack cocaine in violation of Title 21, United States Code, Section 841 (a) (1).

On September 21, 1999 Petitioner entered a plea of guilty to counts charged.

On June 16, 2000 the District Court recalled its acceptance of the Petitioners guilty plea and reinstated the Petitioners plea of not guilty on all counts.

On August 4, 2000, the Petitioner was sentenced to one hundred eighty eight months (188) imprisonment.

The Petitioner did not file a direct appeal on the plea or sentence.

On July 16, 2001, Petitioner filed his 28 U.S.C. 2255 in the District Court.

On August 20, 2001, the District Court filed its Memorandum Ruling (APPX. 3) and order (APPX. 2) denying his 28 U.S.C. 2255.

On September 10, 2001, Petitioner filed his Notice of Appeal to the
Fifth Circuit (APPX. 5)

On September 18, 2001, the District Court denied the Petitioner a Certificate of Appealability (APPX. 4)

On December 21, 2001, the Fifth Circuit issued its order denying a Certificate of Appealability

## REASONS FOR GRANTING THE PETITION

The statutory and regulatory history, along with the United States Constitution clearly demonstrate that the statues cited in Petitioner's indictment as predicates for the alleged criminal activity are a **legal nullity**. See *United States of America v, Sabretech Inc* 00-14516 (11th Cir. 10-31-2001)

The Government has failed to give petitioner and other similarly situated individuals due process by failure to follow their own administrative rules by not "**never**" scheduling **crack cocaine.**

The Governments failure to schedule **crack cocaine** violates this Court's decision in *United States v. Generix Drug Corp* 460 US 459 (1983) and decisions in *United States v. Housky* 751 F. Supp 1446, 1447 (D. Nev. 1990), *United States v. Viernes* 763 F. Supp 1068, 1071 (D. Hawaii 1991), *United States v. Deisch* 20 Fed. 130, 149 (5th Cir. 1994).

### I. Rules of Statutory Construction Mandate that the Controlled Substance Act of 1970, 21 U.S.C. 801 et seq, 21 U.S.C. 301 et. seq. and the Administrative Problems Act 5. U.S C. 551-559 Be Read Consistently.

"It is a Fundamental Canon of Statutory Construction that the words of a statue must be read in their context, and with a view to their place in the overall statutory scheme. Court must therefore interrupt the statue as a symmetrical and coherent regulatory scheme" *Food and Drug Administration v. Brown and Williamson Tobacco Corporation* 529 U.S. 120, 123 (2000).

Applying this Canon of Statutory Construction to the Controlled Substance Act of 1970 (C.S.A. 1970) ; 21 U.S.C. 801et seq., the Administrative Procedure Act 5 U.S.C. 551-559; Food, Drug and Cosmetic Act 21 U.S.C. 301 et seq. requires that these statues be read consistently to require the government to follow their own

administrative rules in designating a drug.

**II <u>The Government Continued Refusal to Schedule Crack Cocaine as a Drug , Violates the Accardi Doctrine</u>.**

The District Courts decision along with the 5th Circuit Order deepens a conflict within the Government and the Courts of Appeals and District Courts, of whether crack cocaine is schedule or not, and or needs to be scheduled. The Chemical Composition Chart (APPX. 6) is clear beyond peradventure that cocaine and crack cocaine are (2) two distinct drugs, requiring scheduling, pursuant to the statues administrative rules of the Government. The Arcardi Doctrine provides that an Administrative Agency must follow its own Proceedural Rules, if those rules will affect an individuals rights *Accardi v. Shauganessy* 347 U .S. 260 (1954). This Court in *Morton v. Ruiz* 415 U.S. 199 (1974) held that the Accardi Doctrine also apples to Procedural Rules found in an Agencies Internal Manual.

**III <u>Failure to Schedule Crack Cocaine Leaves No Predicate For the Alleged Criminal Activity.</u>**

The District Court and 5th Circuits failure to address this issue in any shape, form, fashion, or words that could impart such address makes it clear that they agree that the drug crack cocaine has "<u>never</u>" been scheduled. In the 1986 Legislative Session no less than (5) five Bills were introduced for the purpose of criminalizing crack cocaine. Each and every one of them began with a Provision to legislatively schedule crack cocaine in Schedule I. However, and what is incomprehensible is that when these bills emerged from the Judiciary Committee all the Scheduling Provisions for crack cocaine had been completely stricken and it was never discussed again, but in the same session of Congress, these same Committees scheduled cocoa tea?

Petitioner knows it will be hard for this Court to admit that all these convictions and citizens have been imprisoned for something that was not a crime under the Law. It is evident that it so politically embarrassing that the Government has made the decision over the years to just turn a blind eye to avoid the problem.

Today, the known facts and the absence of candor on the part of the Government and the 5th Circuit serves as persuasive evidence that the failure to schedule crack is a gross dereliction of Due Process found under the Constitution.

## IV The Court Should Resolve the Split Among the Circuit Courts of Appeals and the District Courts.

The 1st Circuit in 1994 stated, "Here the term cocaine base was neither irrelevant nor unfairly prejudicial. The indictment served as notice to Lewis of the nature of the charges against him. Indeed identifying the substance as cocaine base was an essential element of the Governments case against Lewis" *United States v. Lewis* 40 F3d 1325, 1346 (1st cir 1994)

"Defendants cannot be indicted for distributing a drug that was not placed on the list of controlled substances" *United States v. Caudle* 828 F2d 1111, 1112 (5th Cir 1987)

*United States v. Brown* 859 F2d 974, 976 (D.C. Cir 1988) defining crack as cocaine possessing a hydroxyl radical.

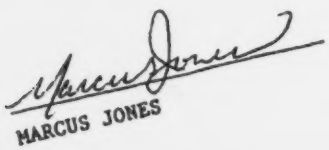
*United States v. Gaulteau* 4 F3d 1003, 1004 (D.C. Cir 1993) acknowledging that the definition hydroxyl radical was simply incorrect.

"Neither cocaine base or crack cocaine nor any equivalent term is mentioned in Section 841 (a) or in any of the controlled substance schedules; nor is their anything in the controlled substance schedules which can be said to describe cocaine base (or crack cocaine) as a discrete variety or type of cocaine". *United States v. Deisch* 20 F3d 130, 149 (5th Cir. 1994)

In the interest of judicial consistency and to protect due process rights, this Court should resolve these splits.

## CONCLUSION

In petitioner's case, the government made a charging decision and asked a grand jury to indict him for crack cocaine, knowing it was not a scheduled drug, and pursuant to the Accardi Doctrine, was and then remains today and uncontrolled substance, not subject to prosecution, leaving the Court without Subject Matter Jurisdiction.

"S  "

MARCUS JONES